

No. 14667

United States
Court of Appeals
for the Ninth Circuit

RUTH WHITEHEAD, Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy of the
Estate of Ned Whitehead, bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

A. A. GOLDSTONE,
756 South Broadway,
Los Angeles 14, California.

For Appellee:

QUITTNER AND STUTMAN; and
GEORGE M. TREISTER,
639 South Spring Street,
Los Angeles 14, California. [1*]

* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy No. 55507-WM

In the Matter of NED WHITEHEAD, d/b/a WHITEHEAD & CO., Bankrupt.

PETITION FOR ORDER TO LEVY EXECUTION UPON ASSETS IN POSSESSION OF TRUSTEE AND ORDER

The petition of Ruth Whitehead respectfully represents:

I.

That your petitioner is the former wife of Ned Whitehead, the above-named bankrupt, and that petitioner and said Ned Whitehead have one minor child, Wendy Gay Whitehead.

II.

That petitioner obtained a final judgment of divorce from said above-named bankrupt, Ned Whitehead, being case No. D-382949 in the Superior Court of the State of California in and for the County of Los Angeles; that said divorce became final on or about July 25, 1951.

III.

That said judgment of divorce awarded the custody of said minor child to petitioner and provided that the defendant pay to petitioner for the support of said minor child the sum of \$150.00 per month on the 15th day of each month; that said

order for the [7] support of said minor is still in full force and effect; that there is accrued and unpaid under said judgment for the support of said minor child the sum of \$2,250.00; and that there is due, owing, and unpaid from said Ned Whitehead to petitioner for the support of said minor child the sum of \$2,250.00 from July 15, 1952 to and including September 15, 1953.

IV.

That said judgment of divorce of said Superior Court also provided that said above-named bankrupt, Ned Whitehead, pay to petitioner for her support and maintenance the sum of \$250.00 per month, on the 15th day of each month, commencing June 15, 1952; that said order is still in full force and effect; that there is accrued and unpaid under said judgment for the support of petitioner the sum of \$3,750.00; and that there is due, owing, and unpaid from said Ned Whitehead to petitioner for the support of petitioner the sum of \$3,750.00 from July 15, 1952 to and including September 15, 1953.

V.

That there are assets of said above-named bankrupt, Ned Whitehead, in the possession and under the control of A. S. Menick, the duly appointed trustee of the said bankrupt, including shares of stock in Whitehead & Co., and that petitioner is informed and believes, and therefore avers that there will be a surplus of such assets after payment or adjustment of the claims of creditors in

the above-entitled matter, and that said surplus of assets is available for payment of the sums due, owing, and unpaid from said bankrupt, Ned Whitehead, to petitioner under said judgment of divorce.

Wherefore, your petitioner prays for an order authorizing and permitting petitioner to levy execution or garnishment upon said trustee and upon all the assets of the bankrupt herein in the possession of said trustee, and that the surplus of said assets in excess of that required for payment to creditors of the bankrupt [8] herein and the costs of administration herein be held to be subject to and be used for the payment of the sums due petitioner from the bankrupt, as hereinabove set forth, namely the total sum of \$6,000.00.

Dated this 8 day of October, 1953.

/s/ RUTH WHITEHEAD,

Petitioner

[9]

Duly Verified.

[11]

[Endorsed]: Filed October 8, 1953.

[Title of District Court and Cause.]

ORDER TO LEVY EXECUTION UPON ASSETS IN POSSESSION OR UNDER CONTROL OF TRUSTEE

Upon the filing and reading of the above and foregoing petition of Ruth Whitehead, and good cause appearing therefor, it is hereby

Ordered that said petitioner, Ruth Whitehead, be and she is hereby authorized and permitted to levy execution and/or garnishment upon all of the assets of the hereinabove named bankrupt, Ned Whitehead, in the possession and under the control of A. S. Menick, trustee in the above-entitled matter, including the stock of Whitehead & Co., in the possession of said trustee, provided, however, that said assets shall be first applied to the payment and satisfaction of the allowed claims of creditors herein and costs of administration herein, the surplus of said assets in excess of said approved and allowed creditors' claims and expenses of administration to be applied toward payment of said sums due said Ruth Whitehead.

Dated this 8 day of October, 1953.

/s/ REUBEN G. HUNT,
Referee

[10]

[Endorsed]: Filed October 8, 1953.

[Title of District Court and Cause.]

PETITION FOR CONFIRMATION AND AUTHORITY TO ENTER INTO CONTRACT

The petition of A. S. Menick, respectfully shows:

I.

That he is the duly appointed, qualified and acting Trustee in the above-entitled matter.

II.

That your petitioner has taken over all of the known assets of the above-entitled bankrupt, including 378 shares of stock in Whitehead & Co., Inc., a Puerto Rican concern. In addition, there remains undisposed of, a small inventory of tools and parts, an equity in an automobile and certain possible patentable ideas.

III.

That the bankrupt herein is presently employed by Whitehead & Co., Inc. in Puerto Rico and has offered to purchase the remaining assets of this estate for the sum of \$13,500.00, and has offered to execute, in connection with said purchase an agreement, a true copy of which agreement is attached to this petition. [12]

IV.

Your petitioner alleges that if the remaining assets of this estate were sold at public auction, they would not bring into this estate the sum of \$13,500.00 and that it would be for the best interest of this estate and the creditors herein if this private sale to Ned Whitehead for the consideration of \$13,500.00 be confirmed by this Court. In connection with this sale, your petitioner desires to become a party to the attached agreement for the further protection and benefit of this estate.

Wherefore, your petitioner prays that upon reading and filing of this verified petition, that this Court set a time and place for hearing and that a 10-day notice thereof be sent to all creditors herein,

and that upon approval of this petition by the Court and the creditors, that an order be made confirming the sale to Ned Whitehead of the remaining assets of this estate in the sum of \$13,500.00, subject to the terms and conditions of the agreement attached to this petition and that a further order be made authorizing and directing your petitioner to become a party to the said agreement and to execute any and all other documents necessary to carry out the terms thereof.

/s/ A. S. MENICK,

Petitioner

QUITTNER AND STUTMAN,

/s/ By WILLIAM J. TIERNAN [13]

AGREEMENT

Agreement made on this . . . day of, 1953, at Los Angeles, California, between Ned Whitehead, presiding at San Juan, Puerto Rico, hereinafter referred to as the "Pledgor", and Alfred S. Menick, residing at, California, Trustee in Bankruptcy in the proceedings pending in the United States District Court, Southern District of California, Central Division, entitled "Ned Whitehead, doing business as Whitehead & Company, bankrupt, No. 55507-WM," hereinafter referred to as the "Trustee."

Witnesseth:

Whereas, the Trustee has on this day sold and the Pledgor has purchased the following assets belonging to the estate of the bankrupt in the proceeding mentioned above:

(1) 378 shares of the capital stock of Whitehead & Co., Inc.

(2) Equity in 1950 Oldsmobile Convertible 98.

(3) Equity in certain conditional contract of sale, involving sale by American Type Founders, Inc., to the bankrupt of One—Chief 22, 17½ x 22½ Offset Press, complete with standard equipment—220 volt, 60 cycle, 3 phase AC motor—Serial No. 3943, UCR No. 35-1713. Said contract dated August 29, 1952. In this connection, while the contract is made in the name of Whitehead, the Bankrupt, substantial down payments have been made by the Puerto Rico corporation.

(4) A small amount of inventory in possession of the Trustee, consisting generally of small electrical parts and hand tools. (See Exhibit A, attached.)

(5) Certain unapplied for patent ideas.

The foregoing enumeration is meant to be general, only. It is the separate purpose and intent of this agreement to convey to Ned Whitehead in exchange for the considerations herein stated all of the remaining known assets of the bankrupt estate in the possession of the Trustee, with the exception of accounts receivable and cash, already in the possession of the Trustee.

Whereas, the Pledgor has delivered to the Trustee in full payment for the sale and transfer of the assets listed above, a promissory note of even date for a total of \$13,500.00 of principal, payable in installments on the first day of each month, starting the 1st day of September 1953, in equal payments of \$750.00 in principal and bearing interest at the

rate of 6% on and after maturity of each instalment if not paid on said due date.

Whereas, the parties to this agreement have agreed, as one of the conditions of the sale by the Trustee to the Pledgor that the said 378 shares of capital stock of Whitehead and Co., Inc., a Puerto Rico corporation, shall be re-assigned, transferred and re-delivered to the Trustee, in pledge, to secure the payment of principal and interest of the above mentioned note, according to the terms thereof, and to secure the performance of each and every condition and covenant of this sale and pledge agreement.

Now, Therefore, It Is Mutually Agreed, as follows:

1. The Pledgor, hereby assigns, transfers and delivers to the Trustee and his successor or successors all right, title and interest in and to said 378 shares of stock of Whitehead & Co., Inc., to have and to hold said shares of capital stock to his own use and behoof, forever, but subject to the terms and conditions of this agreement. [15]

2. The Pledgor shall have the right to vote said stock and to receive any dividends or distributions declared or issued thereon so long as the terms and conditions of this agreement are fulfilled.

3. The Pledgor covenants and agrees that as long as the note above mentioned plus accrued interest remain unpaid he will not vote the shares of capital stock herein pledged, or any of them, for the following purposes:

- (a) To mortgage the property of Whitehead &

Co., Inc., except for a full and adequate consideration, or

(b) To sell the property of Whitehead & Co., Inc., other than in the usual course of business, or

(c) To consolidate, merge or dissolve Whitehead & Co., Inc., or

(d) To otherwise prejudice the value of the shares herein pledged by transactions affecting or involving the capital stock or the assets of Whitehead & Co., Inc.

4. The Pledgor agrees that, so long as said note shall remain unpaid: Whitehead & Co., Inc., will not assign, transfer, mortgage, hypothecate, or pledge its property, or any substantial part thereof, without a full and adequate consideration, and shall at all times comply with all acts, laws, rules, regulations and orders of any insular or federal legislative, executive, administrative or judicial body, commissioner or officer exercising any power of regulation or supervision over Whitehead & Co., Inc., or over any part of any of its assets.

5. The Pledgor agrees to pay all taxes, assessments and Government charges lawfully imposed on the shares pledged herein or the assets of Whitehead & Co., Inc., to the prejudice of the shares herein pledged.

6. The Pledgor agrees that any dividends or distributions received by him in respect to the shares herein pledged shall be first applied to the payment of the principal and interest of the aforementioned note. [16]

7. In the event any one or more of the following

should happen, the Trustee may declare the principal of all said note then outstanding, even though not then due and payable, to be immediately due and payable and said note on such declaration shall become immediately due and payable:

(a) Failure to pay any installment of said note within 30 days after said installment becomes due and payable.

(b) Failure to perform the conditions contained in Sections 3 and 4 of this agreement.

(c) If Whitehead & Co., Inc., should become insolvent or should file a petition in bankruptcy or if a petition in bankruptcy should be filed against Whitehead & Co., Inc., or if a petition for reorganization should be filed on behalf of or against Whitehead & Co., Inc., or if a petition for extension, composition, or an arrangement under the National Bankruptcy Act should be filed on behalf of a or against Whitehead Co., Inc., or should the said corporation be subject to any proceedings under any insolvency law or should make general assignments for the benefit of creditors or if a receiver of the property of the said corporation should be named or if any sequestration proceeding be brought against Whitehead & Co., Inc., or if any proceedings be begun to dissolve or liquidate Whitehead & Co., Inc., or if any judgment for the transfer or delivery of a substantial portion of its property be entered against Whitehead & Co., Inc.

8. The Pledgor agrees that during the duration of this agreement his withdrawals from Whitehead & Co., Inc., other than salary, shall be limited as follows:

(a) No sum in excess of \$1,000 a month plus actual transportation costs shall be expended for travel and entertainment expenses away from Puerto Rico, without the consent of the Trustee;

(b) No sum in excess of \$500 per month shall be expended as subsistence allowance while the Pledgor remains in Puerto Rico. [17]

9. The Trustee may upon the failure of the Pledgor duly and punctually to pay the debt represented by the note herein mentioned or any part thereof, as and when due, as provided herein, or as provided by said note, immediately, without demand for payment, without publication, but upon 30 days notice by regular mail to the Pledgor, sell any or all of said shares herein pledged at any broker's board, or at public or private sale and apply the proceeds of such sales as far as needed toward the payment of the whole of the said indebtedness together with the interest thereon and the expenses of sale; and the Pledgor shall remain responsible for any deficiency remaining unpaid after such application; and it is expressly understood and agreed that the Trustee may himself be a purchaser at any such sale of the whole, or any part, of said shares of capital stock sold, free of any right, or equity of redemption, such right or equity of redemption being hereby expressly waived and released.

10. (a) No right or remedy conferred herein shall be deemed to exclude any other right or remedy herein conferred or existing at law or equity.

(b) No delay or omission by the Trustee to exercise any remedy or right accruing upon any de-

fault shall impair such right or remedy or be construed to be a waiver of any such default, or an acquiescence therein, nor shall it affect any subsequent default of the same, or of a different nature.

11. The Trustee expressly agrees that if the sum of \$13,500.00, together with other moneys in the possession of the Trustee is more than enough to pay the expenses of administration and all the claims of creditors allowed and allowable in the bankruptcy proceedings, previously mentioned, including secured and unsecured and tax claims, then and in that event, such excess shall be rebated to Ned Whitehead and shall be credited on said promissory note.

12. As a part of this agreement of sale and pledge, the Trustee agrees to and does herewith release Mr. Ned Whitehead and Whitehead & Co., Inc. of any and all causes of actions he may have [18] against either or both of them.

13. The parties to this agreement expressly agree that any uncollected accounts receivable already collected or due the bankrupt, are to remain the property of the Trustee and the Pledgor agrees to forward to and deliver to the Trustee any and all funds collected by Ned Whitehead or Whitehead & Co., Inc. on behalf of the bankrupt.

.....
Trustee

.....
Ned Whitehead [19]

EXHIBIT "A"

In the Matter of Ned Whitehead dba Whitehead
Company

Page 1 & 2	Tools	\$ 413.50
Page 3 & 4	Supplies	326.62
Page 5	Supplies Purchased for Selector Inc.	194.38
Page 6	Office Equipment	75.00
		<hr/>
		\$1,009.50

Assets located in Garage at 1633 So. Orange Dr.,
Los Angeles, Calif.

A. S. Menick, Trustee, 420 H. W. Hellman Bldg.,
354 So. Spring St., Los Angeles, Calif.
Phone MI 5547

Inventory Taken 3/1 and 3/14 by A. G. Imig

Tools

T 1	1-Corner Rounder No. 11615.....	\$ 5.00
2	1-1 Hole Paper Punch.....	1.00
3	3-Misc. Clamps	2.00
4	1-Paper Cutter	1.00
5	1-Pressure & Release Press No. 59...	20.00
6	1-Water Cooled Die	2.00
7	2-Pr. Tin Snips Wiss #M-1.....	1.25 2.50
8	1-Bearing Puller, Plumb No. 4021...	2.50
9	1-Dumore Bench Drill Press No. X93828	25.00
10	1-A.C. Ampmeter	2.50
11	21-Misc. Punch Dies	3.00
12	1 G.E. D.C. Kilovolt Test Meter.....	25.00

13	3-Beard Expanding Reamers	3.00	9.00
14	25-Misc. Reamers	2.00	50.00
15	18-Misc. Taps	2.00	36.00
16	5-Misc. Drills (countersinks)	3.00	15.00
17	70-Misc. Drills various size	1.00	70.00
18	1-Drill Press Vise		3.00
19	1-5/16" Thor Elect. Drill No. 488423 w/Jacobs Chuck		35.00
20	2-Sets 5/32" Steel number dies	12.00	24.00
21	1-Set 3/16" Steel Letter Dies		20.00
22	1-Set 5/32" Steel Letter Die		20.00

Page 1 \$373.50

Tools

T 23	1-Set 1/2" Steel Number Die		20.00
24	1-Set 1/8" Steel Number Die		12.00
25	1-1/8" to 2" Reamer		5.00
26	1-lot 1/4" Grinding Wheels		3.00

Page 2 40.00

Supplies

S 1	13-Partial Rolls Misc. Wire	\$ 20.00	
2	2-Wired Selector Panels, as is	5.00	10.00
3	2-Partial Wired Experimental Test Panels	5.00	10.00
4	4-Boxes Misc. Elect. Parts		5.00
5	1-Box 3/4" x 12" Insulating Strips		1.00
6	261-Plugs and Receptacles . . . . .	.03	8.07
7	1-Sarkes Tarzian No. 7N26261BBS Condenser		3.00
8	5-Misc. Used Transformers	1.00	5.00
9	2-Western Elect. Transformers, Used	2.00	4.00

10	2-Jeffries Elect. Transformers, No. 88288 & 86	3.00	6.00
11	1-G.E. Elect. Transformers 9TD1224E1		2.95
12	1-Cramer Timer No. 46948-E.....		5.00
13	24-Misc. Brass & Alum. Angles.....		1.50
14	35-Telephone Relays No. 13034-1..	2.25	78.75
15	185-Misc. Relays (New & Used)...	.50	92.50
16	138-NE-2 Neon Bulbs .....	.05	6.90
17	925-G.E. Welded Germanium Diode K1135478-18 .....	.03	27.75
18	85-Sangamo 01-600 Resistors .....	.02	1.70
19	1-Lot Soldering Tips		2.00
20	100-Misc. Jacks & Plugs		3.00
21	4-Amperite Delay Relay Tubes No. 11562 .....	.75	3.00
22	5-Selector Plugs .....	.50	3.00
23	250-Nickel Plated Plug connections	.01	2.50

Page 3 302.12

Supplies

S 24	16 sq. ft. 1/4" Bakelite.....		10.00
25	30-Mercoid Covers .....	.15	4.50
26	1-Lot Misc. Allen Head Bolts.....		10.00

Page 4 24.50

Supplies—Selector, Inc.

S 1	50-No. P-3 Relays 800 ohm.....	1.38	69.00
2	24-No. 221 Relays 235 ohm.....	1.38	33.12
3	9-No. 229 Relays 500 ohm.....	1.38	12.42
4	4-No. 224 Relays 500 ohm.....	1.38	5.52
5	4-No. 224A Relays 1000 ohm.....	1.38	5.52
6	4-No. 1P42RCA Tubes	7.50	30.00

7	1-No. 12AU7GE Tubes	4.00
8	70-Toggle Switches .....	.24 16.80
9	1-Sound Recording Tape	1.00
10	3-Rolls Music Wire	3.00 9.00
11	1-Lot Drill Patterns	5.00
12	6 ft. 3/8" Brass Rod, square.....	3.00

Page 5 194.38

Office Equipment

1 Underwood Typewriter No. 3959262.....\$75.00
 Located at Office of A. S. Menick, Trustee, 354 So.
 Spring St., Los Angeles, Calif. [26]

Page 6

Duly Verified. [27]

[Endorsed]: Filed May 13, 1953.

[Title of District Court and Cause.]

ORDER RE CONFIRMATION OF SALE

This matter came on to be heard before the undersigned Referee in Bankruptcy in his courtroom in the Federal Building, Temple and Spring Streets, Los Angeles, California, upon the verified Petition for Confirmation of private sale and for authority to enter into a contract filed by the Trustee herein. The Trustee appeared through his attorneys, Quittner and Stutman (William J. Tiernan of counsel). No one appeared in opposition to the said Petition and the Court finds due notice to creditors and parties in interest has been given; it is therefore

Ordered, that the Petition of the Trustee be and it hereby is granted; it is

Further Ordered that the sale of the remaining assets of this estate as set forth in the aforesaid Petition be and it hereby is confirmed to Ned Whitehead; it is

Further Ordered that the Trustee be and he hereby is authorized and directed to execute the agreement, a copy of which is attached to the verified Petition, and the Trustee is further ordered to execute any and all documents necessary to carry out the terms of the aforesaid agreement.

Dated: This 1st day of June, 1953.

/s/ HUGH L. DICKSON,

Referee in Bankruptcy

[28]

[Endorsed]: Filed June 1, 1953.

[Title of District Court and Cause.]

PETITION TO COMPROMISE

The petition of A. S. Menick, respectfully shows:

I.

That he is the duly appointed, qualified and acting Trustee in the above-entitled matter.

II.

That heretofore, to-wit, on the 1st day of June, 1953, an order was made upon the petition of the Trustee herein to sell certain assets to Ned White-

head, the bankrupt herein, pursuant to a contract of sale. That the chief asset so conveyed under said contract was 378 shares of the capital stock of Whitehead & Co., Inc., a corporation doing business in the Commonwealth of Puerto Rico. That the total purchase price was to be the sum of \$13,500.00, to be paid in monthly installments of \$750.00 commencing with the 1st day of September, 1953. As security for the said purchase price, the said 378 shares of stock was pledged to the Trustee. Reference is made to the petition of the Trustee on file herein for confirmation and authority to enter into said contract, and the said contract attached to the said petition as an Exhibit. Thereafter, the bankrupt indicated his inability to make such [29] monthly installment payments and an order was entered herein authorizing your petitioner to grant to Ned Whitehead an extension of ninety (90) days for the time of making the payments under the contract, and, in addition, authorizing and directing your petitioner to accept reduced payments in the amount of \$500.00 per month.

III.

That since the said sale of the assets, including the said stock, Ned Whitehead the purchaser thereof has only paid the sum of \$1000.00 on account of said purchase and despite every effort on the part of your petitioner to collect the balance he has been unable to do so and said contract is now in default.

IV.

That because of current economic conditions in Puerto Rico, the stock of the said corporation has now become of uncertain value and if your petitioner were to conduct a pledge sale he would have to liquidate the corporation in the Commonwealth of Puerto Rico. That all of the assets of the said corporation are heavily encumbered and your petitioner doubts that the full purchase price could be realized by that method. That by reason of the great distance from California and the lack of competitive bidding in Puerto Rico such a liquidation could be disastrous.

V.

That the said Ned Whitehead has made an offer to settle the balance due to your petitioner for the sum of \$6000.00 cash and has deposited a treasury check for said sum with his attorneys, Grainger, Carver and Grainger, to be paid over to the Trustee in the event this petition is approved.

VI.

That your petitioner recommends the acceptance of the said offer and the approval of the said compromise. That your petitioner believes that the said compromise is in the best interests of this estate.

Wherefore, your petitioner prays that this Court set a date for hearing on the above petition; that ten (10) days' notice of such hearing be given to creditors herein; that this petition be granted and an order made by the Court authorizing your peti-

tioner to compromise the said controversy with Ned Whitehead on the terms aforesaid.

A. S. MENICK,

Trustee

QUITTNER AND STUTMAN,

/s/ By H. F. QUITTNER,

Attorneys for Trustee [31]

Duly Verified. [32]

[Endorsed]: Filed March 22, 1954.

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE
RE RELEASE OF WRIT OF EXECUTION

The petition of A. S. Menick respectfully represents to this Court:

1. That he is the duly appointed, qualified and acting Trustee in Bankruptcy of the estate of the above named bankrupt.

2. That on or about the 8th day of October, 1953, Ruth Whitehead, a creditor of the above named bankrupt, procured an ex parte order of the above entitled court permitting her to cause to be levied a writ of execution upon your petitioner as trustee herein, purporting to be upon all assets of the bankrupt in possession of or under the control of your petitioner as such trustee, including stock of Ned Whitehead & Co.

3. That pursuant to said order, said Ruth Whitehead caused an execution to be served upon your

petitioner purporting to be upon all assets of the bankrupt, including stock in the Ned Whitehead & Co.

4. That at the time of the purported levy of execution, it had not been determined what, if any, were the rights of said bankrupt herein in and to the property or moneys in the possession of petitioner [33] and said rights are still undetermined.

5. That during the course of the proceedings herein, Ned Whitehead entered into an agreement with your petitioner as trustee herein, wherein he sought to purchase all of the right, title and interest of the trustee herein and of the bankrupt estate in and to stock in the Ned Whitehead & Co. That said Ned Whitehead, the bankrupt herein is in default in the payments to be made by him hereunder.

6. That said purported levy of said purported writ of execution has interfered and continues to interfere with the administration of the estate of the bankrupt by your petitioner, and particularly in the following manner:

(a) It is interfering and preventing a proposed compromise by Ned Whitehead in respect to a settlement between the trustee and said Ned Whitehead of moneys owing under said agreement; and
(b) will interfere with any sale by the trustee of said stock covered by said agreement if it becomes necessary for petitioner to sell at pledgee's sale, in that parties who might otherwise bid will not do so being fearful of litigation arising out of said levy.

7. That said exparte order permitting the said levy was made contrary to law and likewise was contrary to the best interests of this estate.

Wherefore, petitioner prays that an order issue herein, requiring Ruth Whitehead and E. W. Biscailuz, Sheriff of the County of Los Angeles, to appear at a time and place stated, then and there to show cause, if any there be, why an order should not be made and entered herein vacating and setting aside said ex parte order permitting the said levy of said execution, and declaring null and void and of no effect the writ of execution caused to be levied by Ruth Whitehead as set forth herein, and requiring said Ruth Whitehead to execute any instruments of release that may be proper.

Dated this 8 day of July, 1954.

/s/ A. S. MENICK,
Trustee

[34]

Comes now Ned Whitehead, through his attorneys, and hereby joins in the foregoing petition.

GRAINGER, CARVER AND
GRAINGER,

/s/ By KYLE Z. GRAINGER,

Attorneys for Bankrupt [35]

Duly Verified.

[36]

[Endorsed]: Filed July 13, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

A. S. Menick, the Trustee herein, having filed herein a duly verified petition praying that the hereinafter order be entered, now, therefore, good cause appearing therefor, and no adverse interests appearing thereat,

It Is Ordered that Ruth Whitehead and E. W. Biscailuz, Sheriff of the County of Los Angeles, and each of them be, and they are hereby ordered to appear before the undersigned Referee in Bankruptcy, at 339 Federal Building, Los Angeles, California, on the 29 day of July, 1954, at the hour of 10 o'clock a.m. of said day, then and there to show cause, if any there be, why an order should not be made and entered herein vacating and setting aside that certain ex parte order, dated October 8, 1953, permitting levy of execution on the trustee herein, and declaring null and void and of no effect the writ of execution caused by Ruth Whitehead to be levied and served upon the trustee herein, and requiring said Ruth Whitehead to execute any instruments of release that may be proper.

It Is Further Ordered that service may be made upon the respondents herein by mail, by mailing a copy of the within [37] order, and a copy of the petition upon which it is based, to Ruth Whitehead, at 449 North Sycamore, Los Angeles, California, and to her attorney of record herein, A. A. Goldstone, 756 South Broadway, Los Angeles, Cali-

fornia, and to E. W. Biscailuz, Sheriff of the County of Los Angeles, State of California, at least five days before the hearing hereon.

Dated this 15 day of July, 1954.

/s/ DAVID B. HEAD,

Referee in Bankruptcy [38]

[Endorsed]: Filed July 13, 1954.

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[Title of District Court and Cause.]

ORDER VACATING AND SETTING ASIDE
ORDER PERMITTING LEVY OF WRIT
AND DECLARING NULL AND VOID
WRIT OF EXECUTION

A. S. Menick, the Trustee herein, having filed herein a petition for an order directing Ruth Whitehead and E. W. Biscailuz, as Sheriff of the County of Los Angeles to appear and show cause why the hereinafter order should not issue, and the bankrupt having joined in said petition and said order to show cause having been duly issued and served, and having come on duly for hearing before the undersigned Referee in Bankruptcy in his Court Room on the 29th day of July, 1954, at the hour of 10:00 a.m. of said day, at said hearing, the Trustee appearing by his counsel, Quittner and Stutman, (Francis Quittner, Esquire, of counsel) the bankrupt appearing by his counsel, Grainger Carver and Grainger (Kyle Z. Grainger, Sr. of

counsel), Ruth Whitehead appearing in person and by her counsel, and E. W. Biscailuz not appearing, and the Court having heard the evidence, and the arguments of counsel, and having considered the matter, now makes its Findings of Fact, and Conclusions of Law as follows: [39]

Findings of Fact

I.

The Court finds that all of the allegations of the Petition for Order to Show Cause re release of Writ of Execution filed by the trustee herein are true.

Conclusions of Law

From the foregoing Findings of Fact, the Court concludes that the ex parte order procured by Ruth Whitehead on or about the 8th day of October, 1953, permitting her to cause to be levied a writ of execution upon the trustee herein purportedly upon all the assets of the bankrupt in the possession of or under the control of the trustee, including the stock of Ned Whitehead & Co. should be vacated and set aside, and the writ of execution caused to be levied by virtue of said order should be declared null and void and of no effect.

Now, Therefore,

It Is Ordered that the Order of this Court dated October 8, 1953, permitting Ruth Whitehead to cause to be levied a writ of execution upon A. S. Menick, the trustee herein, purportedly upon all the assets of the bankrupt in the possession of or under the control of the trustee, including the stock

of Ned Whitehead & Co., be and the same is hereby vacated and set aside.

It Is Further Ordered that the writ of execution levied upon the trustee by virtue of said order be, and the same hereby is declared and the same is null and void and of no force or effect.

Dated this 16 day of August, 1954.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [40]

[Endorsed]: Received August 6, 1954. Filed August 16, 1954.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF ORDER
OF REFEREE

To the Honorable Hugh L. Dickson, Referee in
Bankruptcy:

The petition of Ruth Whitehead respectfully represents:

1. That your petitioner is a creditor of the above-named bankrupt and is a party aggrieved by the order hereinafter set forth and complained of; that she has a judgment for alimony and support of a minor child of the parties, Wendy Gay Whitehead, now twelve (12) years of age; that Ned Whitehead, the above-named bankrupt, has been permitted in the proceeding herein to draw substantial sums for his support, but that for the last twenty-six (26) consecutive months he has failed

and refused, and still fails and refuses to make any payment whatsoever on said order and judgment for the support of petitioner and said minor child; and that he has been and is now outside the jurisdiction of the State of California.

2. That on or about October 8, 1953, an order was made in the above entitled matter by Referee Reuben G. Hunt, permitting the petitioner to levy execution or garnishment upon all of the assets of said bankrupt, Ned Whitehead, in the possession and [41] under the control of A. S. Menick, Trustee in the above entitled matter; provided, however, that said assets shall first be applied to payment and satisfaction of the allowed claims of creditors herein, and also the costs of administration herein, the surplus of said assets in excess of said approved and allowed creditors' claims and expenses of administration to be applied toward payment of the sums due petitioner; that the amount due petitioner for the support of herself and said minor child was then \$6,000.00; that said execution or garnishment was thereupon duly and regularly levied upon said trustee; that there was at the time of said levy of execution corporate stock the property of the bankrupt, and that said stock is still in the possession of the said trustee.

3. That the said trustee obtained an order authorizing him to sell said stock to said bankrupt for a sum in excess of \$13,000.00 and to take back said stock in pledge as security for the payment of said sum, the bankrupt to pay certain specified monthly payments on said sum; that subsequently,

said trustee sought authority to compromise said sum in excess of \$13,000.00 by reducing it to \$6,000.00 and to accept \$6,000.00 from said bankrupt in full discharge of all claims against him and the bankrupt estate and to deliver said stock to said bankrupt, Ned Whitehead; that said sum of \$6,000.00 is approximately the same amount requested herein for attorney's fees and expenses of administration, so that the petitioner and all other unsecured creditors would receive absolutely nothing from the estate herein; and the bankrupt would again be in full possession of his business and again be in fact the sole owner thereof.

4. That on or about July 13, 1954, said trustee filed an Order to Show Cause herein requiring petitioner to show cause why the said levy or execution or garnishment and said order heretofore made should not be vacated and set aside, and be declared null and void; that said petition was heard by the Honorable Hugh L. [42] Dickson, Referee in Bankruptcy, on July 29, 1954; that petitioner, through her counsel, A. A. Goldstone, stipulated and agreed that said pledged stock might be sold to any bidder or purchaser, including the bankrupt, Ned Whitehead; that good title to said stock could be delivered to any bona fide purchaser thereof, free and clear of the petitioner's execution, but that if the stock were sold to Ned Whitehead, the bankrupt herein, as to him only the said execution should continue in full force and effect; that petitioner so far has not in any manner sought to and did not interfere with the administration of the

above-entitled estate, but that the Honorable Hugh L. Dickson, Referee herein, made an order setting aside and declaring null and void said execution or garnishment of petitioner; that petitioner is informed and believes and therefore, alleges that said order of said Referee is improper and not in accordance with the law and is in excess of his jurisdiction. Said order is as follows:

“A. S. Menick, the Trustee herein, having filed herein a petition for an order directing Ruth Whitehead and E. W. Biscailuz, as Sheriff of the County of Los Angeles to appear and show cause why the hereinafter order should not issue, and said order to show cause having been duly issued and served, and having come on duly for hearing before the undersigned Referee in Bankruptcy in his Court Room on the 29th day of July, 1954, at the hour of 10:00 a.m. of said day, at said hearing, the Trustee appearing by his counsel Quittner and Stutman (Francis Quittner, Esquire, of counsel) the bankrupt appearing by his counsel, Grainger Carver and Grainger (Kyle Z. Grainger, Sr. of counsel), Ruth Whitehead appearing in person and by her counsel, and E. W. Biscailuz, not appearing, and the Court having heard the evidence, and the arguments of counsel, and having considered the matter, [43] now makes its Findings of Fact, and Conclusions of Law as follows:

Findings of Fact

I.

“The Court finds that all of the allegations of the

Petition for Order to Show Cause re release of Writ of Execution filed by the trustee herein are true.

Conclusions of Law

“From the foregoing Findings of Fact, the Court concludes that the ex parte order procured by Ruth Whitehead on or about the 8th day of October, 1953, permitting her to cause to be levied a writ of execution upon the trustee herein purportedly upon all the assets of the bankrupt in the possession of or under the control of the trustee, including the stock of Ned Whitehead & Co. should be vacated and set aside, and the writ of execution caused to be levied by virtue of said order should be declared null and void and of no effect.

“Now, Therefore,

“It Is Ordered that the Order of this Court dated October 8, 1953, permitting Ruth Whitehead to cause to be levied a writ of execution upon A. S. Menick, the trustee herein, purportedly upon all the assets of the bankrupt in the possession of or under the control of the trustee, including the stock of Ned Whitehead & Co., be and the same is hereby vacated and set aside.

“It Is Further Ordered that the writ of execution levied upon the trustee by virtue of said order be, and the same hereby is declared and the same is null and void and of no force or effect.

“Dated this 16th day of August, 1954.”

Wherefore, petitioner prays that said order be reviewed [44] by a judge of this Court, the execution

restored; that said order be set aside and vacated and that the Referee promptly prepare and transmit to the Clerk thereof his certificate thereon, together with a statement of the question presented and a transcript of the evidence taken at said hearing, together with all exhibits, if any, therein offered; that the trustee be restrained from selling, assigning, or transferring said stock until further order of the court.

/s/ A. A. GOLDSTONE,
Attorney for Ruth Whitehead,
Petitioner

/s/ RUTH WHITEHEAD,
Petitioner [45]

Affidavit of Service by Mail attached. [46]

Duly Verified. [48]

[Endorsed]: Filed August 18, 1954.

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[Title of District Court and Cause.]

CERTIFICATE ON REVIEW

To the Honorable William C. Mathes, Judge of the United States District Court, Southern District of California, Central Division:

I, Hugh L. Dickson, Referee in Bankruptcy, to whom the above entitled matter has been referred, do hereby certify as follows:

That in the within proceedings, A. S. Menick, the Trustee, on July 13, 1954, filed a petition for order

to show cause re release of writ of execution, wherein he prayed that an order issue requiring Ruth Whitehead and E. W. Biscailuz as Sheriff of the County of Los Angeles, to appear at a time and place stated, and show cause why an order should not be made and entered herein vacating and setting aside a previous ex parte order permitting a levy of execution and declaring null and void and of no effect the writ of execution caused to be levied by Ruth Whitehead. Upon such petition, an order to show cause was issued, requiring said parties to appear before the undersigned Referee in Bankruptcy, and on the 29th day of [49] July, 1954, a hearing was had upon the said petition, and evidence was presented that on October 8, 1953, Ruth Whitehead, a creditor of the bankrupt, procured an ex parte order of this court permitting her to levy a writ of execution upon the trustee, purporting to be upon all assets of the bankrupt in possession of, or under the control of the trustee. Pursuant to said order, said Ruth Whitehead caused an execution to be served upon the trustee purporting to be upon all assets of the bankrupt. At the time of the levy of said writ of execution, it had not been determined what, if any, were the rights of the bankrupt in and to the properties or moneys in the possession of the trustee. The said rights are still not determined.

During the course of the bankruptcy proceedings, Ned Whitehead, the bankrupt, entered into an agreement with the trustee for the purchase of the right, title and interest of the trustee in and to

stock in Whitehead & Co., Inc., wherein installment payments were provided to be made and the said stock in Whitehead & Co., Inc. was pledged with the trustee to secure the payments to be made under the said agreement.

Thereafter, Ned Whitehead became in default in the payments to be made by him under said agreement; and after so becoming in default, he made an offer of compromise to the trustee in respect to a settlement between the trustee and him respecting the moneys owing under said agreement.

The said Whitehead & Co., Inc. is a corporation located and having its principal place of business in Puerto Rico, and is a corporation dependent in the main for any successful operation upon the personal efforts of Ned Whitehead. Said levy of execution interferes with the said compromise settlement, and also interferes with any pledgee's sale of the stock.

I, as Referee, having heard the evidence and the [50] arguments of counsel, on the 16th day of August, 1954, made my Findings of Fact, Conclusions of Law and Order all as set forth in the order of August 16, 1954, being the order sought to be reviewed by the petition for review in this proceeding. By said order, I adjudged as follows:

“It Is Ordered that the Order of this Court dated October 8, 1953, permitting Ruth Whitehead to cause to be levied a writ of execution upon A. S. Menick, the trustee herein, purportedly upon all the assets of the bankrupt in the possession of or under the control of the trustee, including the stock of

Ned Whitehead & Co., be and the same is hereby vacated and set aside.

“It Is Further Ordered that the writ of execution levied upon the trustee by virtue of said order be, and the same hereby is declared and the same is null and void and of no force or effect.”

Thereafter, there was duly filed by the said Ruth Whitehead a petition for review of the said order.

Questions Presented

The questions presented are:

1. Did the Referee properly order that the ex parte order of October 8, 1953, permitting Ruth Whitehead to cause to be levied said writ of execution be vacated?

2. Did the Referee properly order that the writ of execution levied upon the trustee by virtue of said order be annulled?

Papers Submitted With This Certificate

In compliance with the provisions of Section 39-a (8) of the Bankruptcy Act, I attach to this Certificate the following: [51]

(a) Petition for Order to Levy Execution upon Assets in Possession of Trustee and Order to Levy Execution Upon Assets in Possession or Under Control of Trustee (Filed October 8, 1953).

(b) Petition for Confirmation and Authority to Enter into Contract; and Agreement attached thereto (Filed May 13, 1953).

(c) Order re Confirmation of Sale (Filed June 1, 1953).

(d) Petition to Compromise (Filed March 22, 1954).

(e) Petition for Order to Show Cause re Release of Writ of Execution (Filed July 13, 1954).

(f) Order to Show Cause (Filed July 13, 1954).

(g) Order Vacating and Setting Aside Order Permitting Levy of Writ and Declaring Null and Void Writ of Execution (Filed August 16, 1954).

(h) Petition for Review of Order of Referee (Filed August 18, 1954).

Respectfully submitted this 14th day of October, 1954.

/s/ HUGH L. DICKSON,

Referee in Bankruptcy

[52]

[Endorsed]: Filed October 14, 1954.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW OF ORDER OF REFEREE

To the Honorable William C. Mathes, Judge of the United States District Court, Southern District of California, Central Division:

The following points and authorities are submitted in support of the petition of Ruth Whitehead for review of the Order of Hugh L. Dickson, Referee in Bankruptcy, in the above-entitled matter.

In Bankers' Mortg. Co. of Topeka, Kansas, et al., vs. McComb, et al., 60 F.2d 218, it was held as follows:

"It is a general rule that, where a person's possession or control of property constitutes custodia legis, he cannot be subjected to garnishment process in respect of such property (citing among other cases—

In re Argonaut Shoe Co., (C.C.A. 9) 187 F. 784).

"The reason for the rule is that to require such a person to respond in garnishment would result in an interruption of the orderly progress of judicial proceedings and in an invasion of the jurisdiction of the [53] court which has legal custody of such property. (Citing cases, including In re Argonaut Shoe Co., supra).

"Such a person, with the consent of the court having custody of such property may be held as garnishee after the purposes of the law's custody have been accomplished and such court has by order directed delivery thereof to the garnishee-debtor. Under such circumstances, garnishment will not interrupt the progress of judicial proceedings in such court nor invade its jurisdiction. The officer holds the property not for the law but for the persons entitled thereto; and the reason for the rule no longer exists. (Citing cases)"

/s/ A. A. GOLDSTONE,

Attorney for Ruth Whitehead [54]

Affidavit of Service by Mail attached. [55]

[Endorsed]: Filed October 19, 1954.

In the United States District Court for the Southern District of California, Central Division

In Bankruptcy No. 55507-WM

In the Matter of NED WHITEHEAD, dba Whitehead & Co., Bankrupt.

ORDER ON REVIEW OF REFEREE'S ORDER
OF AUGUST 16, 1954

Upon the petition for review filed August 18, 1954 by Ruth Whitehead; upon Referee Hugh L. Dickson's Certificate on Review filed October 14, 1954; upon the proceedings had before the referee as appear from his certificate; and it appearing that the referee predicated his order upon his findings that the facts alleged in the "Petition for Order to Show Cause Re Release of Writ of Execution" are true, which findings of fact are to be accepted upon review by this Court unless "clearly erroneous" [General Orders 37, 47; Fed. Rules Civ. Proc., Rule 52(a); see Bankruptcy Act § 39(a)(8), 11 U.S.C. § 67(a)(8)];

It Is Now Ordered that the Referee's "Order Vacating and Setting Aside Order Permitting Levy of Writ and Declaring Null and Void Writ of Execution" filed August 16, 1954 is hereby confirmed.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail on

(1) Referee Hugh L. Dickson;

(2) A. A. Goldstone, Esquire, attorney for petitioner; and

(3) Messrs. Grainger, Carver & Grainger, attorneys for respondent.

December 1, 1954.

/s/ WM. C. MATHES,

United States District Judge [61]

[Endorsed]: Judgment Entered and Filed December 2, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Ruth Whitehead, Creditor of the above-named bankrupt, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Vacating and Setting Aside Order Permitting Levy of Writ and Declaring Null and Void Writ of Execution dated August 16, 1954, and from the Order on Review and Referee's Order of August 16, 1954, dated December 1, 1954, by the above-entitled matter, and from the whole thereof.

Dated: December 22, 1954.

/s/ A. A. GOLDSTONE,

Attorney for Ruth Whitehead,

Appellant [62]

Affidavit of Service by Mail attached. [63]

[Endorsed]: Filed December 23, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 68, inclusive, contain the original Petition in Involuntary Bankruptcy, Order of General Reference, Petition for Order to Levy Execution Upon Assets in Possession of Trustee and Order, Petition for Confirmation and Authority to Enter Into Contract, Order Re Confirmation of Sale, Petition to Compromise, Petition for Order to Show Cause Re Release of Writ of Execution, Order to Show Cause, Order Vacating and Setting Aside Order Permitting Levy of Writ and Declaring Null and Void Writ of Execution, Petition for Review of Order of Referee, Certificate on Review, Memorandum of Points and Authorities in Support of Petition for Review of Order of Referee, Memorandum of Points and Authorities on Behalf of Respondents on Review of Order of Referee, Order on Review of Referee's Order of August 16, 1954, Notice of Appeal, Designation of Record on Appeal, and Designation of Additional Record on Appeal, which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court this 25th day of February, 1955.

[Seal] EDMUND L. SMITH,
Clerk

/s/ By THEODORE HOCKE,
Chief Deputy

[Endorsed]: No. 14667. United States Court of Appeals for the Ninth Circuit. Ruth Whitehead, Appellant, vs. A. S. Menick, Trustee in Bankruptcy of the Estate of Ned Whitehead, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: February 26, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14667

RUTH WHITEHEAD, Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy of the
Estate of Ned Whitehead, doing business as
Ned Whitehead & Co., Bankrupt, Appellee.

DESIGNATION OF RECORD ON APPEAL

Comes Now Ruth Whitehead, the Appellant in the above entitled action, and designates the statement of points and authorities and portions of the record on appeal to be printed pursuant to Rule 17 of the above entitled Court:

1. Petition for Order to Levy Execution Upon Assets in Possession of Trustee, and Order;
2. Order to Levy Execution Upon Assets in Possession or Under Control of Trustee;
3. Petition for Order to Show Cause re Release of Writ of Execution;
4. Order to Show Cause re Vacating and Setting Aside Order dated October 8, 1953, Permitting Levy of Execution on Trustee;
5. Order Vacating and Setting Aside Order Permitting Levy of Writ and Declaring Null and Void Writ of Execution;
6. Petition for Confirmation and Authority to Enter into Contract; and Agreement attached thereto (filed May 13, 1953);

7. Order re Confirmation of Sale (filed June 1, 1953);

8. Petition to Compromise (filed March 22, 1954);

9. Petition for Review of Order of Referee;

10. Appellant's Memorandum of Points and Authorities in Support of Petition for Review of Order of Referee;

11. Certificate on Review;

12. Order on Review of Referee's Order of August 16, 1954;

13. Notice of Appeal.

Dated this 31st day of May, 1955.

/s/ A. A. GOLDSTONE,

Attorney for Ruth Whitehead,
Appellant

[Endorsed]: Filed June 1, 1955. Paul P. O'Brien,
Clerk.